PERWIRA AFFIN BANK BHD

v.

HJ ZAKARIA HJ ISMAIL & ORS

HIGH COURT MALAYA, ALOR SETAR
ALAUDDIN MOHD SHERIFF J
[ORIGINATING SUMMONS NO: 24-946-95]
5 MARCH 1998

CIVIL PROCEDURE: *Execution - Stay - Application for - Test to be applied - Special circumstances test, whether still applicable - Whether appeal would be rendered nugatory test, whether good law - What would qualify as special circumstances - See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors - Apparent contradiction between decisions of Federal Court and Court of Appeal*

This was an application by the defendants for a stay of execution in respect of an order for sale granted earlier by the instant court in favour of the plaintiff. The order of stay was sought by the defendants pending their appeal to the Court of Appeal against the said order for sale. The grounds advanced by the defendants were, *inter alia*, that their appeal would be rendered nugatory if the order of stay sought was refused, and that there were merits in the appeal.

Held:

[1] In an application for a stay of execution pending an appeal, the applicant will have to show, by way of affidavits, that there are **special circumstances** in order that the court may exercise its discretion in his favour. The governing principle is that the court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show **special circumstances** to justify it. [*Syarikat Berpakat v. Lim Kai Kok*; *Serangoon Garden Estate Ltd v. Ang Keng*; *Kerajaan Malaysia v. Jasanusa Sdn Bhd*; *Kerajaan Malaysia v. Dato' Hj Ghani Gilong*; *Re Kong Thai Sawmill (Miri) Sdn Bhd*].

[2] The Court of Appeal had recently held in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* that the paramount consideration governing an application for a stay of execution is that the appeal, if successful, **should not be rendered nugatory**. It appears, however, that this Court of Appeal decision did not consider the earlier decisions of the Federal Court in *Kerajaan Malaysia v. Jasanusa Sdn Bhd* and *Kerajaan Malaysia v. Dato' Hj Ghani Gilong*. These two decisions of the Federal Court are binding on the instant court, and the 'special circumstances' test is, undoubtedly, still applicable.

[3] The defendants' affidavit filed in support of their instant application did not show that their appeal to the Court of Appeal, if successful, would be rendered nugatory. The inconvenience that might be caused to the defendants would not render their appeal nugatory. In any case, neither inconvenience nor the risk of their house being demolished could qualify as special circumstances to justify a stay of execution. Likewise, neither merits nor strong grounds for an appeal nor the correctness or otherwise of judgments are special circumstances.

[Defendants' application for a stay of execution dismissed with costs.]

Cases referred to:
Atkins v. GW Ry [1986] 2 TLR 400 ***(cit)***
Che Wan Development Sdn Bhd v. Cooperative Central Bank Bhd [1989] 3 MLJ 40 ***(cit)***
Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161 ***(foll)***
Kerajaan Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 ***(foll)***
Punca Khelasik [1996] 2 AMR 1955 ***(cit)***
Re Kong Thai Sawmill (Miri) Sdn Bhd [1976] 1 MLJ 131 ***(foll)***
See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 ***(not foll)***
Sykt Berpakat v. Lim Kai Kok [1983] 1 MLJ 406 ***(foll)***
Toh Kheng Heng & Anor v. Ahmad Fauzi Mohd Taufek [1994] 1 CLJ 547 ***(cit)***
Wu Shu Chen v. Raja Zainal Abidin Raja Hussin & Anor [1996] 2 CLJ 353 ***(cit)***

Legislation referred to:
Courts of Judicature Act 1964, s. 73

For the plaintiff - CC Chan; M/s Skrine & Co
For the defendant - Lee Chan Tong; M/s CT Lee & Co

Reported by Gan Peng Chiang

JUDGMENT

Alauddin Mohd Sheriff J:

On 8 March 1997, I granted an order for the sale of the SPK lands. The defendants being dissatisfied with my decision had filed an appeal against it and at the same time this application (encl. 56) for stay of execution was also filed.

There is only one issue to be determined in this application ie, whether the applicants/defendants are entitled to an order of stay of execution of the order for sale pending the outcome of their appeal before the Court of Appeal.

According to the applicants there are two appeals before the Court of Appeal. The first appeal is in respect of the default judgment obtained by the plaintiff bank on 11 October 1994 which resulted in the commencement of the foreclosure action. The second appeal is in respect of my decision given on 8 March 1997 granting the order for sale of the SPK lands.

In this application the applicants rely on three grounds:

(1) The appeal would be rendered nugatory and the substratum of the appeal would be destroyed if stay is refused.

(2) There are merits in the appeal.

(3) Liability of applicants/defendants to pay.

Let me make it clear that this application before me is an application for stay of execution pending appeal before the Court of Appeal against my earlier decision ie, granting an order for sale of the SPK lands. I am not concerned with the appeal against the decision of the High Court Kuala Lumpur granting the default judgment.

It is trite that an appeal does not operate as a stay of execution (see s. 73 CJA 1964). However the courts are given the discretion to order otherwise.

With respect to the court's power or discretion to grant or refuse an application for stay, Hashim Yeop Sani J (as he then was) in *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406 had this to say at p. 107:

> As a rule the court will however only grant stay if there are special circumstances and which circumstances must be deposed in the affidavit supporting the application. The governing principle in all cases where the court is asked to exercise its discretion is clearly expressed by Brown J in *Serangoon Garden Estate Ltd. v. Ang Keng* [1953] MLJ 116 and the principle is this: the court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it.

Counsel for the respondent/plaintiff rightly submitted that there is a long line of local authorities which constantly hold that in an application for stay of execution pending appeal the applicant will have to show by way of affidavits that there are special circumstances in order for the court to exercise its discretion.

See: (1) *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1976] 1 MLJ 131.

(2) *Kerajaan Malaysia v. Jasanusa Sdn. Bhd.* [1995] 2 CLJ 701.

(3) *Kerajaan Malaysia v. Dato' Haji Ghani Gilong* [1995] 3 CLJ 161.

Although, in the recent case of *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299 the Court of Appeal held that the paramount consideration governing an application for a stay of execution, is that the appeal, if successful should not be rendered nugatory, I am bound by the decisions of the Federal Court in *Re Kong Thai Sawmill, Jasanusa* and *Dato' Hj. Ghani Gilong.*

With the greatest of respect, it would be observed that the Court of Appeal in *See Teow Guan* did not consider *Jasanusa* and *Dato' Hj. Ghani Gilong* (two authorities from the highest court in the country). There is no doubt that the special circumstances principle in the context of a stay of execution is applicable.

I shall now proceed to consider the grounds of this application.

First Ground

The applicants say that if a stay is not granted their appeal if successful would be rendered nugatory. Upon examination of the affidavit in support of this application, however, I do not see any such evidence.

The applicants, through the fourth defendant, aver as follows:

> 9. Saya dinasihatkan jikalau saya membayar berupa hutang seperti dalam perintah penghakiman ingkar atau pemiutang petisyen tersebut substratum rayuan saya akan dimansuhkan dan menjadi nugatory.
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> 10. Saya dinasihatkan bahawa jika lelongan terhadap tanah/rumah saya diteruskan dan dijual tanah dan rumah tersebut tidak boleh dikembalikan kepada saya apabila rayuan tersebut dibenarkan dan saya tidak ada apa-apa kemungkinan mengambil balik tanah/rumah tersebut.
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> 11. Saya juga dinasihatkan bahawa hak pihak ketiga (3rd party rights) akan timbul jika tanah/rumah dilelong.

With respect, I agree with the submission of learned counsel for the respondent that there is no evidence to show how the appeal would be rendered nugatory or the substratum of the appeal destroyed. The order I have made was clearly an order for sale of the SPK lands and they would remain SPK lands. Even if there is a risk that the house would be demolished, this does not qualify as special circumstance to justify stay of execution (see *Toh Kheng Heng & Anor v. Ahmad Fauzi bin Mohd. Taufek* [1994] 1 CLJ 547 and *Punca Khelasik* [1996] 2 AMR 1955).

Based on the above authorities I cannot see how the claim by the applicants that the appeal would be rendered nugatory can be successful. In my opinion certain inconvenience will certainly be caused to the parties but it will not render the appeal nugatory. In any case inconvenience also cannot qualify as special circumstances to merit a stay of execution (see *Che Wan Development Sdn Bhd v. Cooperative Central Bank Bhd* [1989] 3 MLJ 40).

Second Ground

The applicants say there are merits in their appeal. I see no evidence in the affidavit to support this contention. The issues raised by the fourth defendant in his affidavit are substantially the same as those raised in the affidavit in opposition to the application for an order for sale by the respondent. I had earlier considered these issues at great length. It may well be that merits of the appeal is a relevant consideration but generally merits, strong grounds for appeal, correctness or otherwise of judgments are not special circumstances (See *Atkins v. GW Ry* [1986] 2 TLR 400).

Third Ground

On this ground, I agree with the submission of learned counsel for the respondent that the question of inability of the applicants/defendants to pay is not relevant here. As I have stated earlier I'm only concerned with this application for stay of my order pending determination of the appeal. My order was for the sale of SPK lands and not for any judgment sum or money judgment. Perhaps this contention by the applicants would be a relevant issue for consideration in respect of an application for stay of execution of the judgment given by the High Court, Kuala Lumpur.

With respect, in so far as the respondent/plaintiff is concerned the question of inability to pay does not arise. Should the applicants' appeal be successful there is no doubt that the respondent/plaintiff would be in a sound financial position to compensate them for the loss of the said land (see *Wu Shu Chen v. Raja Zainal Abidin Raja Hussin & Anor* [1996] 2 CLJ 353.)

Finally, I would add that the order given by the Court of Appeal dated 3 February 1997 for stay of execution does not bind this court as the order was obtained by the applicants in respect of High Court Shah Alam decision in S.P. 24-379-95 and not against my earlier order.

Based on the foregoing reasons, I would dismiss the application in encl. 56 with costs.